IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 18, 2008

TORREY LYONEL FRAZIER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Roane County
No. 11903 E. Eugene Eblen, Judge

No. E2007-02518-CCA-R3-PC - Filed March 25, 2009

A Roane County jury convicted Petitioner, Torrey L. Frazier, of second degree murder, and the trial court sentenced him to twenty-two years as a violent offender. Petitioner's conviction and sentence were affirmed on direct appeal, and the Tennessee Supreme Court denied permission to appeal. *State v. Torrey Lyonel Frazier*, E2000-01364-CCA-R3-CD, 2001WL 1627601, at *1 (Tenn. Crim. App., at Knoxville, Dec. 19, 2001), *perm. app. denied* (Tenn. Feb. 21, 2006). Following the filing of Petitioner's petition for post-conviction relief, an agreed order was entered allowing Petitioner a delayed Rule 11 application for permission to appeal to the Tennessee Supreme Court. Petitioner's petition for post-conviction relief alleges, inter alia, that he was denied the effective assistance of counsel. The post-conviction court dismissed the petition after a hearing. On appeal, Petitioner contends that his trial counsel was ineffective because he: (1) failed to request a jury instruction on second degree murder as a "result-of-conduct" offense; (2) failed to appeal the issue of the jury instruction on second degree murder; and (3) failed to raise in Petitioner's motion for new trial an issue involving an allegedly biased juror. After a thorough review of the record and applicable authorities, we conclude that Petitioner has failed to show that his trial counsel rendered ineffective assistance and affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Gerald L. Gulley, Jr., Knoxville, Tennessee, for the Appellant, Torrey Lyonel Frazier.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; Russell Johnson, District Attorney General; Frank A. Harvey, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Background

Following a jury trial, Petitioner was convicted of second degree murder. The facts surrounding Petitioner's conviction were summarized by this Court in the direct appeal as follows:

> The undisputed proof reflects that the defendant shot the victim, Anthony Eugene Thomas, multiple times and, thereby, ended the victim's life. This incident occurred at around 1:00 a.m. on December 28, 1997, at an establishment referred to as "Skinny Miller's." While the defendant does not deny shooting the victim, he claimed and maintains that he acted in self-defense.

Frazier, 2001 WL 1627601, at *1.

II. Post-Conviction

At the post-conviction hearing, Petitioner's trial counsel ("Counsel") testified that he was initially licensed to practice law in the State of Tennessee in 1978 but that his law license was suspended for a year in April 2005 and had not been reinstated. Counsel testified he represented Petitioner on the charge of first degree murder, and the case went to trial in 1999. Counsel said he was not lead counsel in the case but assisted attorney Spence Bruner. The suspension of Counsel's law license was unrelated to his representation of Petitioner.

Counsel testified that Counsel had tried "many" cases before Petitioner's but that this was Bruner's first murder trial. Counsel recalled that Petitioner was found guilty of the lesser-included offense of second degree murder. Counsel said Petitioner's appeal was timely filed, and he did most of the work on the appeal. He recalled he researched two of the appellate issues, and Bruner researched the other two. Counsel did not use a computer to research and used only the books, mainly the West Digest, to find cases that he later "Sheppardized." He did not research unreported decisions. Counsel agreed that, at the time, he was not aware of *State v. Keith Dupree*, No. W1999-01019-CCA-R3-CD, 2001 WL 91794, (Tenn. Crim. App., at Jackson, Jan. 30, 2001), *no Tenn. R. App. P. 11 application filed*, a case he agreed was decided in January, 2001. Counsel further agreed that his appellate brief was filed in November 2000 and that the Court of Criminal Appeals held oral argument on the case in March 2001. He did not supplement his brief while the case was pending before the Court of Criminal Appeals. Counsel testified he would have supplemented the brief if he had been aware that there had been a change in the law.

Counsel testified about a juror who had been excused from the jury pool during voir dire. He said that the potential juror made a comment that one of Petitioner's witnesses, Terrell Gordon, had been charged with rape of a child. Counsel said that the trial judge removed that juror for cause. Counsel believed that this happened before Gordon testified.

On cross-examination, Counsel testified that the clear defense in this case was self-defense. Counsel said that the trial judge removed the juror who complained about one of Petitioner's witnesses, and the juror did not hear the testimony in the case.

On redirect examination, Counsel testified that he did not think that there were any jurors removed at the conclusion of the trial.

Rosetta Marie Harkness, Petitioner's mother, testified that she was present at Petitioner's murder trial. She heard one of the jurors saying that Terrell Gordon had been in a fight with her son. Harkness said that the juror was dismissed at the end of the trial. After the juror was dismissed, Harkness went into the hallway where she saw the juror go across the hallway and into a room on the other side with the rest of the jurors. She saw the juror again in the bathroom, where she asked the juror why she had gone into the room with the rest of the jurors. The juror did not respond to Harkness's questioning.

On cross-examination, Harkness said that she saw the juror go into the room with all of the jurors, accompanied by the victim's sister and the victim's sister's friend. Harkness later saw the juror leave and go into the bathroom, and Harkness followed her. Harkness saw the victim's sister and her friend come out of the room and leave. Harkness said that she also saw the prosecutor go into the room behind the victim's sister and her friend.

Petitioner testified that a juror who had sat through his two-day murder trial was removed before the verdict. When they removed her, Petitioner learned that a member of the juror's family had been involved in an incident with Terrell Gordon. On cross-examination, Petitioner testified that he did not see who went into the jury rooms because he went out another way.

Based upon this evidence, the post-conviction court dismissed Petitioner's petition for post-conviction relief.

III. Standard of Review

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. Tenn. Code Ann. § 40-35-110(f) (2006). However, the trial court's application of the law to the facts is reviewed *de novo*, without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to *de novo* review. *Id.*; *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v.*

State, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the *Strickland* test before he or she may prevail on a claim of ineffective assistance of counsel. *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. *Id.* Failure to satisfy either prong will result in the denial of relief. *Id.* Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

IV. Analysis

On appeal, Petitioner contends Counsel was ineffective because he: (1) failed to request a jury instruction on second degree murder as a "result-of-conduct" offense; (2) failed to appeal the issue of the jury instruction on second degree murder; and (3) failed to raise in Petitioner's motion for new trial the issue involving an allegedly biased juror.

A. "Knowingly" Jury Instruction

In Petitioner's first and second issues, he contends that: (1) Counsel was ineffective when he failed to request a jury instruction on second degree murder as a "result-of-conduct" offense; and (2) Counsel was ineffective for failing to appeal that issue. The State counters that the case announcing that second degree murder was a "result-of-conduct" offense was filed after the trial in this case and that such development in the law could not have been anticipated by Counsel.

Addressing the first of these issues, the post-conviction court found, "Petitioner's allegation of ineffective assistance of counsel concerning the failure to request a jury instruction on Second Degree Murder as a 'result of conduct' offense is not a matter for Post Conviction Relief." Addressing the second issue, the post-conviction court found, "Petitioner's allegation of ineffective assistance of counsel for failure to raise on appeal the issue of the validity of the jury instruction on the requisite mental state for Second Degree Murder is found by the Court at most to be harmless error."

When the trial court charged the jury at the conclusion of Petitioner's trial, it instructed them:

> Any person who commits the offense of second degree murder is guilty of a crime. For you to find the defendant guilty of this offense, the State must have proved beyond a reasonable doubt the existence of the following essential elements.
>
> First, that the defendant unlawfully killed the alleged victim, and that the killing was knowing[]. A person acts knowingly if that person acts with an

> awareness that his or her conduct is of a particular nature, or that a particular circumstance exists, or that the conduct was reasonably certain to cause the result.

Petitioner was convicted of second degree murder on September 13, 1998. Counsel filed the appellate brief in Petitioner's case in November of 2000, and this Court held oral argument on the case in March of 2001. This Court affirmed Petitioner's conviction and sentence in an opinion released December 19, 2001. *Frazier*, 2001 WL 1627601, at *1.

Our Supreme Court released an opinion on July 14, 2000, which considered whether aggravated child abuse, defined in Tennessee Code Annotated section 39-15-401, is a nature-of –conduct or result-of-conduct offense. *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000). The defendant in *Ducker* took the latter position by saying "that one must actually be aware that her conduct would result in serious bodily injury to the child victim." *Id.* Rejecting the defendant's view, which would allow defendants to "argue that, while they in fact knowingly punished or spanked the child, they did not know harm would occur," the Court concluded that child abuse offenses were nature-of-conduct offenses. *Id*. at 897. Illustrating the differences between nature-of-conduct and result-of-conduct offenses, the Tennessee Supreme Court explained why second degree murder, as an example, was a result-of-conduct offense, stating:

> An example of a result-of-conduct offense is second degree murder, which is defined as a "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). In second degree murder, the result of the conduct is the sole element of the offense. The "nature of the conduct" that causes death or the manner in which one is killed is inconsequential under the second degree murder statute. The statute focuses purely on the result and punishes an actor who knowingly causes another's death. The intent to engage in conduct is not an explicit element of the state's case in second degree murder. Accordingly, a result-of-conduct crime does not require as an element that an actor engage in a specified course of conduct to accomplish the specified result.

Id. at 896. The Court did not discuss, however, how a jury was to be instructed as to "knowingly" or whether the pattern jury instruction as to "knowingly," which parroted Tennessee Code Annotated section 39-11-206 (a)(20), was a proper instruction for the term.

Two years later, and after Petitioner's direct appeal had been concluded, in *State v. Page*, 81 S.W.3d 781 (Tenn. Crim. App. 2002), this Court set out proper instructions for the "knowingly" component of second degree murder. The opinion in that case explained the lack of clarity about the proper instructions for the "knowingly" component of second degree murder. *Id.* at 787-88. It noted that the first case to actually find reversible error in the failure to charge second degree murder as strictly a result-of-conduct offense was *State v. Keith T. Dupree*, No. W1999-01019-CCA-R3-CD, 2001 WL 91794, at *4 (Tenn. Crim. App., at Jackson, Jan. 30, 2001), *no. Tenn. R. App. P. 11 application filed*. In *Dupree*, which was filed years after the trial in this case, the trial court had charged the jury *only* with the nature-of-conduct instruction, omitting entirely the result-of-conduct instruction.

Therefore, as to Petitioner's first issue, we conclude that Counsel was not deficient for failing to request that the jury in this case be charged only on the result-of-conduct portion of the "knowingly" instruction. The Petitioner was convicted of second degree murder on September 13, 1998. At the time of his trial, the "knowingly" instruction reflected in the Pattern Jury Instructions included both a nature-of-conduct and a result-of-conduct instruction. Counsel was not deficient for failing to anticipate that there would be a change in the law in the future. Petitioner is not entitled to relief on this issue.

As to Petitioner's second issue, that Counsel was ineffective for failing to appeal the jury instruction, we note that this Court has rejected, in other post-conviction proceedings, the same claim presented in this appeal. *Ernest B. Eady v. State*, No. E2002-03111-CCA-R3-PC, 2004 WL 587639, at *7 (Tenn. Crim. App., at Knoxville, Mar. 25, 2004), *Tenn. R. App. P. 11 application denied* (Tenn. Oct. 11, 2004); *Corwyn E. Winfield v. State*, No. W2003-00889-CCA-R3-PC, 2003 WL 22922272 (Tenn. Crim. App., at Jackson, Dec. 10, 2003), *perm. app. denied* (Tenn. May 10, 2004). In both those cases, we determined that trial counsel had not been ineffective by failing to anticipate from the earlier decision in *Ducker* the later holding of *Page*. The reasoning provided was as follows:

> We begin our analysis of this question by noting that the *Page* opinion was filed more than nine months after the petitioner's appeal was concluded. *Ducker* was decided after the trial of this case; thus, defense counsel could only raise this issue on appeal under the plain error doctrine. *See* Tenn. R. App. P. 52(b). While it is arguable appellate counsel could have anticipated our holding in *Page* based upon *Ducker* and *Dupree*, we do not find his performance was deficient for failing to do so. As we observed in *Page*, *Ducker* was not a second degree murder case and did not discuss jury charges. *See Page*, 81 S.W.3d at 788. Furthermore, the jury instruction in *Dupree* was distinguishable from the jury charge in both *Page* and the instant case. *See id.* In addition, *Dupree*, was decided after the petitioner's brief was filed and shortly before oral argument. Given this chronology of events, we cannot conclude trial counsel's performance was deficient.

Winfield, 2003 WL 22922272, at *12.

After citing the aforementioned reasoning and finding it "persuasive", this Court in *Eady* went on to state:

> The record contains no proof, either at trial or on appeal, that any defense attorneys did what the petitioner argues that his attorney was deficient for not doing, that is, recognized from our supreme court's language in *Ducker* that the pattern jury instructions then being utilized to define "knowingly" were defective.

Eady, 2004 WL 587639, at *8.

In the case presently before us, Petitioner's brief was filed after the Supreme Court's holding in *Ducker* but before this Court's holdings in *Dupree* and *Page*. Oral argument was held two

months after this Court's holding in *Dupree*. Counsel admittedly did not move to supplement his brief with the *Dupree* case or bring the case to this Court's attention during oral argument. This, however, was not "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066, for the issue was not settled until the release of the opinions in *Page* and in the supreme court's opinion in *State v. Faulkner*, 154 S.W.3d 48, 59 (Tenn. 2005), which were after Petitioner's direct appeal had been completed. Thus, the record supports the trial court's finding that Counsel was effective in this regard. Petitioner is not entitled to relief on this issue.

B. Allegedly Biased Juror

Petitioner next contends that Counsel was ineffective for failing to raise in a Motion for New Trial the issue of the impropriety of allowing a juror, Juror Samples, to remain with the jury despite the fact that one of Petitioner's witnesses was charged with assaulting the juror's son. The State counters that the evidence showed only that Juror Samples was excused because she had some previous knowledge of the witness and not because the witness had any pending assault charges involving the juror's son. Further, the State asserts that this issue became moot when the trial court excused Juror Samples.

The post-conviction court found, "Petitioner's allegation of ineffective assistance of counsel for failure to raise on Motion for New Trial the issue of the impropriety of allowing a female juror[] to remain on the jury when one of the Petitioner's witnesses had an assault charge against the son of said juror is found to be without merit, said juror having been dismissed upon the finding of such circumstance."

The record shows that, during the trial, the following occurred:

ASST. GENERAL HARVEY:	I almost forgot, do we need to address the juror issue, about dropping that one juror? We need something on the record that you object or don't object to her being a juror. I don't want an appeal issue if there's going to be one.
[DEFENSE COUNSEL]:	I think the fact that the juror may or may not have concerns about a particular witness is not in itself grounds for disqualification. But I think the fact that the juror came to you and expressed that –
THE COURT:	Because she knew him.
[DEFENSE COUNSEL]:	Because she knew him.
ASST. GENERAL HARVEY:	The concern I've got is that if the defendant – or her child, apparently the victim, I don't

know what she's going to say in the jury room about him. And I don't want any appeal issues.

[DEFENSE COUNSEL]: I think that there – I don't know what you think, but-

[DEFENSE COUNSEL]: General, I think, probably under the circumstances, she should be – when the jurors go in, that she should be excused.

THE COURT: And put the first alternate in.

ASST. GENERAL HARVEY: Obviously, I think if anything, it would work to our benefit, but I don't want an appeal, and I don't want one based on something that happens, or with the ineffective assistance of counsel.

THE COURT: If you all agree on it, then, when we send them out to deliberate, we'll just take her out and replace her with the first alternate.

[DEFENSE COUNSEL]: I think that's probably the safest thing.

Later, after the closing arguments of the parties and the trial court's instructions to the jury, the following occurred:

THE COURT: . . . When you retire to the jury room you will first select one of your members as foreman or forelady who will preside over your deliberations. When you have reached a verdict, you will return with it to this courtroom, and your foreman or forelady will deliver it to the Court.

Ms. Samples, Mr. Allen, Mrs. Moore, you three just remain seated right here.

The rest of the jury now, you may retire for your deliberations.

Then, out of the presence of the jury, the trial court informed Juror Samples:

THE COURT:	Because of what you had said to me, and because of testimony of Mr. Gordon was an integral part of him getting a pistol to the defendant. We have all of us talked, and everybody agreed that we would substitute one of the alternates on there so we would not be putting you in a bad spot of having to evaluate his credibility as a witness on that. So I wanted you to understand what that was.
JUROR SAMPLES:	Okay.
THE COURT:	And you were in Seat Number
JUROR SAMPLES:	Nine.
THE COURT:	All right. Mr. Allen, you are now in Seat Number Nine. Take your place in the jury room for their deliberations.

We conclude that the evidence does not preponderate against the post-conviction court's finding that Counsel was not deficient in this regard. The record indicates that Juror Samples knew Gordon in some capacity, but there is no proof about the extent of her knowledge of him or about whether he was charged with assaulting her son. Further, the record proves that the juror was excused before the jury began deliberating and that she did not accompany the jury to the deliberation room. We acknowledge that Petitioner's mother alleges that Juror Samples, along with the victim's sister and friend and the prosecutor, accompanied the jury into the deliberation room. This evidence, however, is contradicted by the record and the standard practices of trial courts. Accordingly, we conclude Counsel was not ineffective when he failed to include this issue in the Motion for New Trial, and Petitioner is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record and applicable law, we conclude Petitioner has failed to demonstrate that the post-conviction court erred when it dismissed his petition for post-conviction relief. Accordingly, we affirm the judgment of the post-conviction court.

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THOMAS T. WOODALL, JUDGE